No. 6946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

10

MINA H. JOHNSON, SIGMUND BEEL, and A. G. BRODIE,

Appellants,

vs.

F. E. HORTON, FRANK HORTON, JR., R. MCCARTHY, A. F. PRICE, WEEPAH HORTON GOLD MINES COMPANY, a corporation organized and existing under the laws of the State of Nevada, IVEN T. JEFFRIES, O. U. PRYCE, and P. N. PETERSEN,

Appellees.

Notice of Motion to Dismiss Appeal

Motion to Dismiss Appeal

Points and Authorities on Motion to Dismiss Appeal

Answering Brief of F. E. Horton, Frank Horton, Jr., R. McCarthy, A. F. Price and Weepah Horton Gold Mines Company, a corporation, Appellees

THATCHER & WOODBURN,
GEO. B. THATCHER,
WM. WOODBURN,
WM. J. FORMAN,
Reno National Bank Building,
Reno, Nevada
Attorneys for Appellees.

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Appellees.

NOTICE OF MOTION TO DISMISS APPEAL

To Appellants above named, and

To M. E. Gibson, Counsel for appellants:

PLEASE TAKE NOTICE that upon the record and proceedings in this cause filed in this Court, and upon the records and proceedings now on file in this Court in a second appeal prosecuted in said case and filed in the above entitled Court on the 24th day of October, 1932, appellees, F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE and WEEPAH HOR-

TON GOLD MINES COMPANY, a corporation, will move the above entitled Court, at the courtroom thereof in the City of San Francisco, State of California, on the 19th day of January, 1933, at the hour of 10 o'clock A. M. for an order dismissing the appeal in the above entitled cause and for such further relief as to the Court may seem fit and proper.

A copy of said motion and of the brief in support thereof is annexed hereto and herewith served upon you.

DATED this 10th day of January, 1933.

THATCHER & WOODBURN,

GEO. B. THATCHER,

WM. WOODBURN,

WM. J. FORMAN,

Attorneys for Appellees,

F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE, and WEEPAH HORTON GOLD MINES COMPANY, a corporation.

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Appellees.

MOTION TO DISMISS APPEAL

COME NOW the appellees, F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE and WEEPAH HORTON GOLD MINES COMPANY, a corporation, and move this Honorable Court to dismiss the appeal herein upon the ground that the order appealed from is not a final judgment, decree or order, so as to be appealable.

The appeal herein is taken from an order of the District Court of the United States, in and for the

District of Nevada, sustaining a motion to dismiss the amended bill of complaint and dismissing said amended bill of complaint and the supplemental bill of complaint on file therein. Said order appears on pages 59 and 60 of the Transcript of the Record and is not a final judgment, decree or order so as to be appealable, but is simply a dismissal of certain pleadings in the case and did not constitute a final determination of the rights of the parties, as is evidenced by the filing of a second bill in this Court from an order entered in the same case, dismissing a subsequent and second supplemental bill of complaint filed therein after the taking of this appeal. The Transcript of the Record in said second appeal was filed in this Court on the 24th day of October, 1932.

WHEREFORE appellees above named move this Court that said appeal be dismissed and they have their costs in this behalf expended.

THATCHER & WOODBURN,

GEO. B. THATCHER,

WM. WOODBURN,

WM. J. FORMAN,

Attorneys for Appellees,

F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE, and WEEPAH HORTON GOLD MINES COMPANY, a corporation.

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Appellees.

POINTS AND AUTHORITIES ON MOTION TO DISMISS APPEAL

The appellees who have appeared in this case are F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE and WEEPAH HORTON GOLD MINES COMPANY, a corporation. They have filed herein a motion to dismiss the appeal on the ground that the order appealed from is not such a final determination of the rights of the parties involved as to be appealable. The order appealed from is contained on pages

59 and 60 of the Transcript of the Record, and omitting the caption, reads as follows:

> "Defendants' motion to dismiss plaintiffs' amended bill of complaint herein having heretofore been argued, submitted and taken under advisement, IT IS NOW BY THE COURT ORDERED that the said motion to dismiss the amended bill of complaint be, and the same is hereby granted; and the amended bill of complaint and supplemental bill of complaint are hereby dismissed. The Court reserves the right to file written opinion herein later."

The position taken by appellees herein is that this order constitutes nothing more than an order dismissing certain pleadings and is in no sense a final determination of the case, and that there being no final judgment or decree contained in the record, this case is not one within this Court's appellate jurisdiction.

This Court has held in the case of

> *City and County of San Francisco v. McLaughlin, Collector of Internal Revenue, et al.*
> 9 Fed. (2nd) 390,

as follows:

> "Equity rule 29 abolishes demurrers and pleas, and provides that every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss, or in the answer. The mere granting of a motion to dismiss under this rule, unless followed by a final decree,

amounts to nothing more than a determination on the part of the court that the bill is open to one or more of the objections urged against it, and the order on the motion is not final, any more than is an order sustaining a demurrer to a complaint in an action at law. In either case the suit or action is still pending, and must be determined by final decree or judgment before this court can acquire jurisdiction by appeal or writ of error. Schendel v. McGee (C.C.A.) 300 F. 273, 277; Pierce v. National Bank of Commerce (C.C.A.) 282 F. 100; G. Amsinck & Co. v. Springfield Grocer Co. (C.C.A.) 7 F. (2nd) 855."

Also, a somewhat similar question was presented in the case of

Dyar vs. McCandless, 33 Fed. (2nd) 578,

which involved an appeal from an order striking out an answer and conditionally holding plaintiff entitled to judgment. The Court therein held as follows:

"The first question which arises is whether the order was appealable. If it was not, this court has no jurisdiction. It is the duty of the court to determine this jurisdictional question. City and County of San Francisco v. McLaughlin (C.C.A.) 9 F. (2d) 390; Highway Const. Co. v. McClelland, 14 F. (2d) 406 (C.C.A.8); Equitable Life Assur. Soc. v. Rayl, 16 F. (2d) 68 (C.C.A.8).

It is well settled that an order sustaining a demurrer to a complaint, or granting a motion to dismiss a complaint, without entry of judgment, is not a final order within the meaning of section 128, Judicial Code (28 USCA Sec. 225). Clark v. Kansas City, 172 U.S. 334, 19 S. Ct. 207, 43 L. Ed.

467; Missouri, etc. Ry. Co. v. Olathe, 222 U. S. 185, 32 S. Ct. 46, 56 L. Ed. 155; Morris v. Dunbar (C.C.A.) 149 F. 406; Dickinson v. Sunday Creek Co. (C.C.A.) 178 F. 78; J. W. Darling Lumber Co. v. Porter (C.C.A.) 256 F. 455; City and County of San Francisco v. McLaughlin, supra.''

Under the authorities above quoted, if the order in the present case amounts to nothing more than the sustaining of a motion to dismiss or the striking out of certain pleadings, it is not such a final judgment as to be within the appellate jurisdiction of this Court. Under the peculiar facts of this case, it is appellees' contention that such order was not a final judgment, but simply dismissed certain pleadings without cutting off the right to file amended pleadings. The records of this Court show that, in fact, further pleadings were filed in the lower court and they were afterwards dismissed. The order here appealed from was not treated either by the appellants herein or the District Court as amounting to a final determination of the rights of the parties, but amounted to nothing more than a holding that the pleadings were defective as they then stood.

The appeal filed in this Court on the 24th day of October, 1932, shows that subsequent to the taking of this appeal, the appellants appeared in the District Court and filed therein their second supplemental complaint; that a motion to dismiss was directed at the second supplemental complaint and a hearing had thereon, and the second supplemental complaint was subsequently dismissed and an appeal taken to this Court from that order.

The authorities all recognize that the reason for giving this Court appellate jurisdiction only in cases of appeals from a final judgment or decree was to prevent the practice here attempted, that is, to prevent bringing appeals to this Court by piecemeal. It was never intended that each time a demurrer or motion was sustained or granted affecting certain pleadings in a case, that an appeal might be taken and thereafter subsequent pleadings filed and new appeals taken when they were disposed of. The present case involves simply an attempt to bring at least two appeals to this Court in the same case where one would suffice after a final decree or judgment had been entered by the District Court. There can be no doubt, under the ruling of this Court in City and County of San Francisco v. McLaughlin, supra, that the mere granting of a motion to dismiss is not construed as an appealable order.

It may be argued, however, that by the lower court adding the words "and the amended bill of complaint and supplemental bill of complaint are hereby dismissed" the Court thereby entered a final decree in the case.

The second appeal and the Transcript of the Record therein, however, now on file in this Court, show that said order was never so treated, either by the appellants or the District Court, and was treated merely as

an interlocutory order, not disposing of the action, but simply dismissing *certain pleadings*.

For the foregoing reasons, the appeal herein should be dismissed.

Respectfully submitted.

THATCHER & WOODBURN,

GEO. B. THATCHER,

WM. WOODBURN,

WM. J. FORMAN,

Attorneys for Appellees,

F. E. HORTON, FRANK HORTON, JR., R. MCCARTHY, A. F. PRICE, and WEEPAH HORTON GOLD MINES COMPANY, a corporation.

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Appellees.

ANSWERING BRIEF OF

F. E. Horton, Frank Horton, Jr., R. McCarthy, A. F. Price and Weepah Horton Gold Mines Company, a Corporation, Appellees.

STATEMENT OF FACTS

The appellees above named are the only parties defendant who have appeared in this action, and will be hereinafter referred to as the appellees.

This action was commenced in the District Court of the United States, in and for the District of Nevada,

in equity, by the filing of a bill of complaint. Thereafter an amended bill of complaint (Tr. pages 1-50) was filed by the plaintiffs against the appellees. This amended bill of complaint in substance alleged that the plaintiffs were citizens of the State of California; that the individual defendants were citizens of the State of Nevada, and that the defendant corporation was a Nevada corporation, owning mining claims in Nevada whose value exceeded Three Thousand Dollars ($3,000.-00). (Tr. pages 1-3).

That on or about the 19th day of March, 1932, the then directors of the defendant corporation enacted a by-law prohibiting the voting of any shares of stock for the election of directors of the corporation unless all calls and assessments on said stock should be paid prior to the meeting of the shareholders. (Tr. page 6). That a stockholders meeting was thereafter held on the 21st day of March, 1932, and that certain stockholders who had not paid the assessment theretofore levied upon their stock voted for the plaintiffs for directors of the corporation; that the officers of the meeting refused to count such votes but, following the provision of the by-law, declared the individual defendants herein elected directors of the defendant corporation. (Tr. pages 6-11).

It is further alleged that by the votes cast by the stockholders who had failed to pay their assessment, the plaintiffs herein were entitled to become directors of the corporation and to control it; (Tr. pages 9-10); that the by-law enacted by the corporation was invalid and that therefore the plaintiffs are the legally elected

directors of the defendant corporation and that the defendants Horton, Price and McCarthy are in possession of the books, records and properties of the corporation and have refused to deliver them to the plaintiffs, although demand has been made therefor. (Tr. pages 10-11).

The prayer of this complaint (Tr. pages 11-12) asked

(a) That a receiver be appointed to take charge of the books and property of the defendant corporation;

(b) That the individual defendants be restrained from exercising the functions of directors and officers in the defendant corporation;

(c) That the defendants be directed to deliver to the receiver the books and property of the defendant corporation;

(d) That the pretended election of the individual defendants as directors of the corporation be declared void;

(e) That any pretended election or purported office holding of the individual defendants be declared void;

(f) That the purported amendment to the by-laws be declared void;

(g) That plaintiffs be declared legally elected directors of the defendant corporation;

(h) That plaintiffs be declared the legally elected

and acting officers of the defendant corporation.

To this amended bill of complaint appellees herein filed a motion to dismiss (Tr. pages 48-50) upon the grounds

(1) That the District Court did not have jurisdiction because the amount in controversy did not exceed $3,000 and that the matter in controversy was title to corporate offices and that the same was not reducible to a money valuation;

(2) That the amended bill of complaint failed to state a cause of action in favor of plaintiffs and against defendants or either of them;

(3) The amended bill of complaint did not state facts sufficient to constitute a cause of action in equity against defendants or either of them;

(4) That it appears on the face of the amended bill of complaint that it was wholly without equity;

(5) The amended bill of complaint showed that the plaintiff, Mina H. Johnson, had no title to maintain the suit by reason of the fact that it appeared that any stock held by her at the date of the corporate meeting was held by her as executrix of the estate of I. H. Johnson, deceased.

Thereafter, and on the 27th of June, 1932, a supplemental bill of complaint (Tr. pages 51-59) was filed in

the case, alleging in substance that the defendants in the suit had sold all stock on which the assessment had not been paid to O. U. Pryce, P. N. Petersen and the defendant, Weepah Horton Gold Mines Company. (Tr. pages 55-57). That prior to such sale the plaintiffs had held a meeting in San Francisco, California, and extended the period for the sale of delinquent stock for a period of ninety (90) days from and after April 18, 1932. (Tr. page 54). The plaintiffs asked for a decree by this supplemental complaint declaring the sales of stock void, and asked for a decree removing the cloud on the title of said stock. (Tr. page 58).

O. U. Pryce, P. N. Petersen and Iven T. Jeffries were made additional defendants in the supplemental complaint. Neither of these parties, however, has ever been served or appeared in the action.

It appears from the Transcript of the Record, page 55, that P. N. Petersen purchased the stock of the plaintiffs herein, including the stock of I. H. Johnson, the I. H. Johnson stock being that claimed by the plaintiff, Mina H. Johnson, as executrix of the Estate of I. H. Johnson, deceased.

The motion to dismiss plaintiffs' amended bill of complaint came on for hearing on June 27th, 1932, (Tr. pages 50-51), and thereafter the Court entered its order granting the motion to dismiss the amended bill of complaint and dismissing the amended bill of complaint and the supplemental complaint. (Tr. pages 59-60). The appeal herein is taken from such order.

Questions Involved

The appeal in this case involves what may be considered as four distinct questions, as follows:

1. Is the controversy involved in the present suit such that it can be ascertained in money to meet the jurisdictional amount in the United States District Court?

2. Are the facts stated in the amended bill of complaint sufficient to state a cause of action for equitable relief?

3. Are the facts stated in the supplementary bill of complaint sufficient to state a cause of action for equitable relief?

4. Is the by-law complained of invalid?

Upon the determination of these four questions depends appellants' right to a reversal of the order of the District Court.

Is the Matter in Controversy in the Present Suit Ascertainable in Money so as to Have Conferred Jurisdiction upon the District Court.

In the District Court, one of the grounds of the motion to dismiss was that the jurisdictional averment in the complaint that the suit involved an amount in excess of $3,000 was frivolous, in that the amended bill of complaint showed on its face that the matter in controversy was the title to corporate offices and not such a matter as could be ascertainable in money, and therefore not within the jurisdiction of the District Court.

It is now universally held that in order to give a District Court of the United States jurisdiction over a controversy between citizens of different states, the matter in controversy must be such as can be calculated and ascertained in money sufficient to meet the jurisdictional amount. See

Greenough v. Independent Lead Mines Co. et al., 45 Fed. (2nd) 659;

Whitney v. American Shipbuilding Co., 197 Fed. 777;

In re Red Cross Line, 277 Fed. 853.

The cases last cited involved the right to inspect corporate books and in all of the cases it was held that such a right is not one which could be reduced to a money valuation and therefore the Court had no jurisdiction of the controversy.

In the present suit the right sought to be enforced is a declaration by a court of equity that the defendants are not the officers of the defendant corporation and that plaintiffs are legally elected directors thereof. This is a controversy over the title to corporate offices, and involves nothing more. The right to an office is not a right that can be reduced to a money valuation, even though one of the incidents to the office is the exercise of control over property, the valuation of which may exceed the jurisdictional amount.

The Supreme Court of the United States, in the case of

DeKrafft v. Barney, 2 Black 704, 17 L. Ed. 350,

had before it an appeal which involved the right to act

as a guardian over the person and estate of a minor child. The Supreme Court, in passing upon the question, held as follows:

> "This case cannot be distinguished from the case of Barry v. Mercein, 5 How. 103. The controversy in that case was between a husband and his divorced wife, respecting the guardianship of a child of the marriage who was still an infant.
>
> They were living apart, and each of them claimed the right to the guardianship. And after full argument, the court held that in order to give this court jurisdiction under the 22d section of the Judiciary Act of Sept. 24, 1789, ch. 20 (1 Stat., 73), the matter in dispute must be money, or some right, the value of which could be calculated and ascertained in money. And as the matter in controversey between the parties was not money, nor a right which could be measured by money, but was a contest between the father and mother of the infant upon other considerations, the appeal was dismissed for want of jurisdiction.
>
> In the case before the court, it is admitted that DeKrafft, the appellant, has no pecuniary interest in the controversy. He appears as prochein ami for the children of Barney, whose wife is dead, and from whom the children inherited a large property. DeKrafft alleges that Barney, from his character and habits, is unfit to be trusted with the guardianship of the persons or property of his children, and prays that some other persons suitable and trustworthy may be appointed by the Orphans' Court. The guardianship of the persons and property of the children is, therefore, the only matter in dispute, not on account of any pecuniary value at-

> tached to the office, but upon other considerations. The case is the same in principle with that of Barry v. Mercein, above referred to, and the appeal to this court, for the same reason, must be dismissed for want of jurisdiction."

The foregoing case involved the right of the Supreme Court to exercise its appellate jurisdiction in cases where the right was not one reducible to a valuation in money. The situation is analagous to the case at bar in that in the case cited the right sought to be enforced was also the right to an office, namely that of guardian. In the present suit the plaintiffs are attempting to enforce a similar right in asking that their right to be and act as directors of a corporation be enforced. In this connection, it must be observed that this suit is not in the nature of a stockholders bill to enforce the rights of the plaintiffs as stockholders, but, quoting from appellants' opening brief, "the relief sought is based on plaintiffs' rights as directors and officers of the corporation as the representatives of a majority of the stockholders of the corporation". In appellants' opening brief it is contended that in the present suit the value of the assets of the corporation must be taken to be the matter in dispute and that the amended bill of complaint shows that the value of the corporate assets is in excess of the sum of $3,000.00. The bill of complaint, however, demonstrates that the controversy involved here is not a controversy over certain property but solely a contest over the right to an office or offices to which the right to act in a fiduciary capacity in controlling certain property is only an incident.

The cases cited in appellants' opening brief in support of their position here are

Klein v. Wilson & Co., 7 Fed. (2nd) 772;

Local No. 7 Bricklayers Union v. Brown, 278 Fed. Reporter 271;

Presto-Lite Co. v. Bournonville, et ux, 260 Fed. Reporter, 440.

The case of Klein v. Wilson & Co., supra, involved a suit by a stockholder on behalf of all the other stockholders to determine the corporation's solvency and distribute its assets through the agency of a receivership. The Court held that the value of the corporation's assets was the property in dispute. Clearly the amount involved was the entire assets of the corporation. The case is not, however, analagous to the situation in the case at bar, where the plaintiffs are seeking simply to be restored to certain offices of the corporation.

Local No. 7 Bricklayers Union v. Brown, supra, was an application for an injunction to restrain the defendants from putting into effect a judgment issued by the executive board of the union suspending the plaintiffs from membership in the bricklayers, masons and plasterers union. Apparently no question was raised as to the value of the memberships of the members being worth more than $3,000, and the Court held that this was a class suit and the aggregate interests of the whole class constituted the matter in dispute, and these interests exceeded in value the sum of $3,000. It was also held by the Court in such case that while the jurisdiction of the court was attacked on the ground that the

case did not involve property, that this contention was no longer available since the defendants had voluntarily answered in the case.

The case of Presto-Lite Company v. Bournonville, supra, is in no way analagous to the case at bar, but was an action by a certain corporation seeking an injunction against the selling of certain products bearing the plaintiff's trademark. The trademark was property which exceeded in value the jurisdictional amount and the injunction sought to protect this property right.

It will be noted in this connection that it is not alleged in the pleadings in the case at bar that the defendants herein were injuring the property of the corporation or threatening to do so, nor is there any allegation that the value of any of the corporation's property was being impaired by the acts of the defendants in acting as directors of the defendant corporation.

The entire matter involved in this controversy is the right to certain offices and no contention is made that they are of any particular pecuniary value. The relief sought is to place the plaintiffs in such offices and remove the individual defendants therefrom. This is clearly a right not reducible to or ascertainable in money.

Are the Facts Stated in the Amended Bill of Complaint Sufficient to State a Cause of Action for Equitable Relief.

As heretofore pointed out in the statement of facts, the amended bill of complaint simply charges that the defendants, by the passing of a by-law which is alleged to be invalid, deprived the plaintiffs of the right to act as corporate directors of the defendant corporation, and further alleged that the individual defendants were in charge of the corporation's books and property. It is the contention of the defendants herein that such statement of facts is not sufficient to warrant the equitable relief demanded in the amended bill of complaint, or any other equitable relief.

It is well settled now by the overwhelming weight of authority that a court of equity has no inherent jurisdiction to deal with the question of corporate elections. A few of the leading cases on this subject are as follows

Hayes v. Burns, 25 Appeal Cases, District of Columbia, 242, Affirmed 201 U. S. 650, 50 L. Ed. 905;

New England Mutual Life Ins. Co. v. Phillips, (Mass.) 141 Mass. 535, 6 N. E. 534;

Grant v. Elder, 64 Colo. 104, 170 Pac. 198;

Cella v. Davidson, (Penn.) (June 27, 1931) 156 Atl. 99;

Fletcher Cyclopedia on Corporations, Volume 3, Section 1828.

This general principle is apparently based on two

grounds; first, that there is an adequate remedy at law by quo warranto or mandamus to enforce the right; second, the right to an office is a personal right, and not a property right with which equity alone deals.

The Supreme Court of the United States has, in at least two instances, held that a right to a political office is not one which equity can enforce, for the reason that equity deals only with property rights, and the right to an office is not such a right. See

White v. Berry, 171 U. S. 366, 43 L. Ed. 199;

White v. Butters, 171 U. S. 379, 43 L. Ed. 204.

Apparently the appellants herein admit the general principle to be correct that equity has no jurisdiction to determine the right to a corporate office, but state their position on page 14 of Appellants' Opening Brief as follows:

> "Appellants cannot concur in this attempted narrowing of the propositions confronting the Court. Something more than the mere title to corporate offices is involved in this case. In substance the question is whether the defendant corporation is to be run and managed by the selected representatives of a majority of the stockholders as provided by the laws of the state of incorporation, or whether a minority group will be permitted to maintain and perpetuate itself in office and in control of the corporation in absolute contravention to the express laws of the State of Nevada."

We believe that the portion of the brief of appellants above quoted is stating in another form that all that is involved in this case is the question—who is going to

control the defendant corporation? How, or in what manner this involves any further question than the title to corporate offices we are unable to comprehend. An analysis of the facts of the complaint and the relief prayed for conclusively shows that the only right sought to be enforced here is the right to a corporate office. The amended bill of complaint prays, first, that a receiver be appointed to take charge of the books and property of the defendant corporation, with the usual powers of a receiver in like cases. No reason is given why a receiver should be appointed other than that the defendants be compelled to turn the property over to such receiver.

The remedy by receivership is an ancillary one and cannot be granted where the bill prays for no ultimate relief which the court could grant; in this case the ultimate relief asked is the determination of the title to corporate offices, which the court of equity has no jurisdiction to grant. The application for a receivership, not for the purpose of winding up the affairs of the corporation but simply to hold the property until the title to the offices is determined, would not change the character of this action to one which equity could exercise its jurisdiction. See

Brictson Mfg. Co. v. Close, et al, 280 Fed. 297.

> "Again an application for a receiver is an ancillary remedy, brought with the purpose of incidently aiding in the procurement of other ultimate relief. It seeks to preserve the corpus pending judicial determination of the rights of the litigants,

which must be appropriately sought in the pending cause."

The amended bill of complaint further asks that an injunction be issued restraining the individual defendants from exercising the powers and functions of officers or directors in the defendant corporation. As heretofore pointed out, this is a question wholly without the jurisdiction of equity, and is sought simply as an aid to secure the possession of the offices by the plaintiffs. See

Kean et al.v. Union Water Co. 52 N. J. Eq. J. 13, 31 Atl. 282,

holding:

"Looking at the bill before us in its general aspects, it presents to our view neither more nor less than a controversy between two rival sets of directors of the corporate defendant, each claiming to be its legal representative, having as such the right to exercise the functions appertaining to their office. This is the sole ground on which jurisdiction over the case in hand can be claimed, for there are no other facts stated in the bill which even tend to strengthen, in this particular, the complainant's position. . . The status of these parties is this: Each contends that the election of directors relied upon by his opponent is invalid for the want of a legal organization of the corporate body at the time of choosing, respectively, such officers. No one who examines the case with the least care can have any doubt upon this subject. There is no ground nor hint of any adventitious circumstance laying a further jurisdictional foundation. If, therefore, the court of chancery had rightful cog-

> nizance of the controversy before us, it was because that court has the power to arbitrate between rival claimants to corporate office. . . This doctrine is not only explicitly stated, but is just as explicitly enforced, by decree in the case of Owen v. Whitaker, 20 N. J. Eq. 122.
>
> . . . . Nor is there a particle of doubt with respect to what Chancellor Zabriskie, who decided the case, considered the issue before him, nor with respect to the rule that was applied in disposing of such issue. He thus certainly, in very plain terms, states the problem he is called upon to solve. He says: 'The first question in the cause is whether the court has jurisdiction to determine whether an election of the directors of a private corporation has been legally held, and whether certain persons claiming to be and acting as directors are such;' and in deciding this question he declares emphatically: 'This court has no jurisdiction to determine the validity of this election, or the right of the directors elected to hold and exercise the office of directors; and therefore can grant no relief that is merely incident to that power, such as to restrain the directors from acting as such'."

Furthermore, no reason is given why an injunction should be granted. There is no allegation in the amended bill of complaint that the property of the corporation or of its stockholders is being wasted or in anywise injured by the acts of the individual defendants, but it is simply urged that they are exercising the rights of officers of the corporation.

In order to authorize the issuance of an injunction by a court of equity, there must be some wrong sought

to be redressed or some injury that may occur to the plaintiffs if the relief be not granted. The complaint in the present case is wholly lacking in any such allegation. See

Sherman v. Clark, 4 Nev. 138,

wherein similar relief was sought in a suit involving the right to a corporate office, and the Supreme Court of Nevada, in passing upon the point, held as follows:

> "Another rule having an important bearing upon this case is, that an injunction is only issued to prevent apprehended injury or mischief, and affords no redress for wrongs already committed. (Practice Act, Sec. 112.) 'Injunction,' says the learned author already quoted, 'is said to be wholly a preventive remedy. If the injury be already done the writ can have no operation, for it cannot be applied correctively so as to remove it. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong'.
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> It must also be made to appear that there is at least a reasonable probability that a real injury will occur if the injunction be not granted. This extraordinary writ should not be issued upon the bare possibility of injury, or upon any unsubstantial or unreasonable apprehension of it. The injury, too, must be real, and not merely theoretical.
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> . . . . And thus plaintiff alleges the defendant 'has attempted to remove his co-Trustee and the President of said company, and has published no-

tices in the public press to that effect, and has seized the books and all the property of the said company, and retains possession of them, and refuses to give them up to the said President and Trustee aforesaid, and prevents him from participating in the control or management thereof, and has ousted and ejected him from his said offices as President and Trustee, and refuses to permit him to discharge any of the duties of the said offices'.

* * * * *

. . . . But the prayer of the bill is: 'That the said defendant, his agents, servants and employes, be enjoined and restrained from interfering with the books and other property of the said Magnolia Gold and Silver Mining Company, and from exercising any of the functions of Treasurer, Trustee, Superintendent or Secretary, except to hold possession of said books and papers of said company, subject to the order of the Court'.

* * * * *

. . . . An injunction may probably be issued on the application of a stockholder to restrain the doing of some act by the officers, which, if done, would result in injury to the company; but if the act be done, an injunction can afford no remedy. If an officer is wrongfully removed from his office it cannot restore him to it; if the books are already taken, this writ cannot compel their return, nor restrain interference with them, unless such interference is likely to result in real injury to the corporation, which in this case is not shown. We conclude, therefore, that there is nothing in this first charge against the defendant warranting the issuance of the writ.''

The amended bill of complaint further prays that the defendants be directed to deliver to the receiver or to the plaintiffs, all of the books, assets and property of the defendant corporation. The law is clear that where the right to corporate property is only an incident resulting from a corporate office, such relief as prayed for in the amended bill here is not within the jurisdiction of a court of equity. See the following authorities:

Hayes v. Burns, 25 Appeal Cases, District of Columbia, 242,

affirmed by the United States Supreme Court in

201 U. S. 650, 50 L. Ed. 905.

"The pleadings clearly show that the main question, and the one without which no other question could have been decided, was the right of the rival parties to the offices to which each claimed to have been elected at the same meeting of the order, in November, 1902, at Niagara Falls. The bill attempts to thinly conceal that this is the principal question by alleging various grounds for equitable relief, and by praying for such relief; but when the case comes on for trial the complainants' counsel frankly states that the 'general object of the bill is to declare that the complainants are the general officers, the general executive board, of the Order of the Knights of Labor, and that the defendants are not such, each set of officers claiming to have been elected to those respective offices at the meeting of the general assembly of the Knights of Labor which met at Niagara Falls on the 11th of November of last year, 1902.' The proofs are directed to that question, and it is self-evident that without a finding upon that question the court was power-

less to make any other finding. The court clearly recognized this, and we find the statement made in the opinion of the court that 'the sole question at issue in the case, therefore, is whether or not the complainants are the legally constituted Order and Officers of the Knights of Labor (Incorporated).' It is manifest that if the complainants are not such officers they have no standing in court. Both sets of parties claim to be such general officers of the corporation, and both claim to have been elected at the same convention. The defendants, claiming to be such officers, were in possession of the property of the corporation, and the complainants were compelled to show and prove that they were entitled to the offices, before they could claim the possession of the property and ask that the defendants be enjoined from interference with the rights of the complainants to administer the affairs of the corporation. Approach the case from any and every standpoint, it will always be found that the question which must be first determined is the single, naked question of the title to the offices. We agree with counsel and court that the question of questions is the title to the offices, and until that is decided in favor of the complainants no relief of any nature can be granted them.''

* * * * *

Referring to only two or three of the many cases similar to the one under consideration, we find the law seemingly well settled. In Bedford Springs Co. v. McMeen, 161 Pa. St. 639, 29 Atl. Rep. 99, which was a suit in equity, where the relief sought was substantially the same as these complainants ask, we find the court affirming a judgment dismissing the bill upon the ground that the com-

plainant had mistaken its remedy. The court said: 'While it is true that the bill in this case was brought to compel the delivery of the property of the company, yet the real controversy as set forth in the bill and answer is upon the validity of the election of the defendants as directors of the company. If they were lawfully elected, the plaintiff has no case and is not entitled to the property claimed. Their title to the office of directors is, therefore, the real question at issue. All the averments of the bill tend to this one subject. Another election of other persons is asserted to have been the only lawful election, and the election of the defendants is alleged to have been unlawful. Thus the title of the one set of directors or of the other forms the matter of contention, and the right to have possession of the property in question is only incidental to the right to the office.' See also Com. v. Graham, 64 Pa. St. 339; Gilroy's Appeal, 100 Pa. St. 5. In the latter case the court said: 'It is perfectly clear that such a question' (title to office), 'cannot be tried by such a proceeding' (by bill in equity)."

The bill further asks that the election of the defendants as directors be declared illegal and void, and that the election of the defendants as officers of the corporation be declared illegal and void. Clearly the only question there involved is the legality or the illegality of a corporate election, of which a court of equity has no jurisdiction. The same rule holds true as to the relief asked that plaintiffs be declared and adjudicated the directors of the corporation.

The remaining relief asked in the bill is that the purported amendment to the by-laws of the defendant cor-

poration, purporting to disqualify for voting purposes certain stock, be declared illegal and void. No cases are cited in appellants' opening brief which would support the right to any such relief. We know of no reason why a court of equity should take it upon itself to declare a by-law of a private corporation illegal or void, unless some relief is sought by the plaintiff, the object of which makes such a course necessary.

In other words, a court of equity would not, simply because a corporate by-law was void, so declare, unless as an incident to granting relief to some injured party. The case cited by appellant in support of the right for this relief is

Lutz v. Webster, 244 Pa. 226, 94 Atl. 834.

The relief sought in that case was the compelling of the holding of a corporate election and in order to effectuate such relief, it was necessary for the Court to declare the by-law invalid. This case is distinguished in a later Pennsylvania case of

Cella v. Davidson, 304 Pa. 389, 156 Atl. 99,

wherein the Court had before it a question involving the validity of a corporate election, and there held:

> "So far as the holding of an election for officers of the corporation is concerned, it must be conceded that the proper remedy to compel this is by mandamus. 38 C. J. 798; Com. v. Keim, 15 Phila. 1. While it is true in Lutz v. Webster, 249 Pa. 226, 94 A. 834, a bill in equity was upheld which ordered a corporate election, the circumstances in that case were exceptional and unique, and the real purpose of the proceeding was to set aside an improper by-

law, and thus bring about a meeting of the corporation.

A court of equity cannot acquire and retain jurisdiction of matters not justiciable before it, such as the removal of corporate officers or the direction of corporate election, through the medium of another matter pleaded within its cognizance, but as to which after hearing it does not act and grants no relief. Ahl's App. 129 Pa. 49, 61, 62, 18 A. 475, 477."

The two cases mainly relied upon by appellants to support their position that a court of equity has the jurisdiction here contended for by appellants are

Johnstone v. Jones, 23 N. J. Eq. 216,

and

Westside Hospital v. Steele, 124 Ill. App. 534.

In the case first above mentioned, the question was the right of the plaintiffs *who were in possession of certain railroad property* to enjoin other persons from interfering with the contractors constructing its road. The defendants set up that they were directors of the corporation. The Court stated that the question of the title to the office was not the main question involved, and held as follows:

"If the question of the legality of an election or whether a certain person holds such an office arises incidentally in the course of a suit of which equity has jurisdiction, that court will inquire into it and decide as any other question of law or fact that arises in the case. . . . but the decision is

only for the purpose of the suit. *It does not settle the right to the office or vacate it if the party is in actual possession.*"

(Italics not in original).

The case of the Westside Hospital v. Steele, also relied upon by appellants, involved a stockholders bill wherein it was charged that two sets of directors were contending over the property of the corporation; that the property of the corporation was deteriorating; the patients of the hospital were not paying their bills; the banks had refused to acknowledge the right of either set of directors to check on the corporation's funds and the corporation's business was about to be ruined because of the conditions existing between the two rival boards of directors. The stockholders had a beneficial interest in seeing the property of the corporation protected and the court of equity for that reason, as appears in the decision, interfered in the case and exercised jurisdiction. Furthermore, this case is decided by a subordinate court in Illinois and is frequently quoted as representing a minority view of equity's jurisdiction in cases of this character. Furthermore, the distinguishing feature not present in the instant case is that this was an action by stockholders for the benefit of the corporation. Here the action is by the plaintiffs as purported directors and not in their capacity as stockholders, and is not even alleged to be for the benefit of the corporation, but is directly brought against the defendant corporation. This distinguishing characteristic should demonstrate that this case, so urgently relied

upon by the appellants, is not analagous to the present situation. See the case of

Sherman v. Clark, 4 Nev. 138 at 149,

wherein the Court held as follows:

> "The affirmance of the order of the lower Court meets my approval on this distinct ground—that the plaintiff shows no right in himself to maintain the action. Suit was brought by Sherman as plaintiff in his individual name, whereas he shows by the complaint that the seventy-nine and a half shares of Magnolia Company stock were held by him exclusively in the character of a trustee for the Austin Silver Mining Company—a foreign corporation. It is not even shown by the pleading that the plaintiff is a stockholder, or has an interest in either of the corporations; nor are there any special circumstances appearing to authorize him to wage a contest with defendant concerning any of the alleged grievances. To all intents and purposes the plaintiff by his own showing, is so far an *outsider* that he could not properly bring the action in his individual name."

In the instant case, Mina H. Johnson, as far as the record in this case shows, owns no stock in her individual name, but was the executrix of the estate of I. H. Johnson, deceased, and I. H. Johnson did own certain stock in the defendant corporation. Her sole right then, which she seeks to protect by this action, is her right as an individual to act as a director of a corporation.

It appears, therefore, that the main question involved in this case is who are or who are not the directors of

the defendant corporation. All other questions raised by the amended bill of complaint are simply incident to this question, and that alone must be determined to grant any ultimate relief to the plaintiffs. The courts are uniform that equity has no such jurisdiction, as is pointed out by the foregoing decisions.

Does the Supplemental Bill of Complaint State a Cause of Action for Equitable Relief

The supplemental bill of complaint sets out in substance that the defendants, as officers and directors of the defendant corporation, sold the stock of all persons who had not paid their assessments for the amount of such assessments and costs. It appears that the stock of the plaintiffs here was sold to one P. N. Petersen. Petersen was made a party to the supplemental complaint but it does not appear in the record that any service has ever been made upon him, or that he has ever appeared in the action. The relief prayed for by the supplemental bill of complaint is that the cloud on the title to the stock sold at delinquent sale be removed, and that it be declared that the purchasers obtain no right, title or interest in and to the stock purchased.

It seems extraordinary that a court of equity should be asked to declare stock held by Mr. Petersen invalid without Mr. Petersen being before the court. As to the remainder of the stockholders other than the plaintiffs in this action, plaintiffs can have no possible right to intervene on their behalf to have a cloud on the title to their stock removed. That right belongs solely to

the injured parties, not to these plaintiffs. See

Sherman v. Clark, 4 Nev. 138, at 146,

wherein the Court held:

> "The cancelation of stock belonging to Brown, and the transfer of it by the defendant to himself, are acts for which Brown has his legal remedy if he chooses to pursue it, but it gives the plaintiff no cause of action. If Brown himself does not wish to complain, the plaintiff, who is simply a stockholder in the company, has no right to complain for him. Brown himself could not obtain an injunction upon such a showing. He might recover his stock, or damages for its conversion, in a proper proceeding, but he could neither obtain the return of his stock nor its value in damages through the medium of an injunction. To enjoin the defendant from interfering with the books of the company would not restore Brown's stock, nor does it appear that there is any more stock that the defendant can cancel; an injunction, therefore, would seem to be useless."

Further, the settled rule is that if the original or amended bill of complaint did not state a cause of action, one cannot be brought in by events occurring after the filing thereof and made a part thereof by a supplementary pleading. See, to this effect:

Kryptok v. Haussman & Co., 216 Fed. 267,

holding:

> "If a plaintiff be without cause of action at the time of the filing of his bill, he is not helped in the sense of having his action continued by bringing in subsequent matters which constitute a good

cause of action, but which are sought to be brought in after answer filed."

Mellor v. Smither, 114 Fed 116,

holding that a plaintiff who has no cause of action at the time of the filing of his original bill cannot by amendment or supplemental bill, introduce one which accrues thereafter. See also, to the same effect:

N. Y. Security & Trust Co. v. Lincoln Street Railway Co., 74 Fed. 67;

Putney v. Whitmire, 66 Fed. 385.

In the case at bar, even if the facts stated in the supplementary pleading constitute a cause of action, the ruling of the lower court was correct for the reason that the amended bill of complaint showed no cause of action in the appellants, and under the rules last stated, appellants could not be aided by the filing of the supplemental bill.

Was the By-Law Complained of Invalid.

It is contended on behalf of appellants that the by-law restricting the voting of stock on which the assessment had not been paid was in violation of the laws of the State of Nevada. The Corporation Law of Nevada, section 28, being section 1627, Nevada Compiled Laws, 1929, provides, in part, as follows:

"Unless otherwise provided in the certificate or articles of incorporation or an amendment thereof, every stockholder of record of a corporation shall be entitled at each meeting of stockholders thereof to one vote for each share of stock standing in his

name on the books of the corporation."

It will be observed that such statute gives the right for a change in this voting power. The articles of incorporation of the defendant corporation provide as follows:

> "At all elections of directors of this corporation, each holder of *stock possessing voting power,* shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected and he may cast all of such votes for a single director, or may distribute them among the number to be voted for or any two or more of them as he may see fit."
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> (Italics not in original).

By the section above quoted, it is the contention of appellees that the incorporators of the defendant corporation restricted, at least in some degree, the voting power of the stock by the use of the words "stock possessing voting power". Unless some such restriction was contemplated, the words "possessing voting power" would be surplusage in the articles. If appellees' view of this section of the articles of incorporation is correct. then the only question involved is whether the by-law here passed by the directors was a reasonable one. See the following authorities:

> 14 *C. J.,* 366;
>
> *Thompson on Corporations,* Volume 2, Section 1161;
>
> *Detwiler v. Commonwealth,* 18 Atl. 990,

stating the rule as follows:

> "A corporation is a voluntary association of

> persons engaged in a common enterprise. When the methods of voting are not fixed by general law, the corporators may make the law for themselves, subject to the qualification that such laws and regulations as they make shall not conflict with the laws of the state or of the United States. The general law did not touch either of the questions now raised, and for that reason the corporators or stockholders took them up, and made a law for themselves, covering both subjects. They have provided that stockholders shall have one vote for each share held by them up to ten shares, and they have fixed the proportion which his votes shall bear to his shares above that number. This is a reasonable regulation, it is uniform in its operation, it conflicts with no law, and it is binding on all the shareholders.''

In the present case the by-law operates uniformly on all shareholders, it conflicts with no law and is binding on all shareholders. It is certainly a reasonable one in that it has for its object the compelling of equal payments by all the shareholders of assessments on stock. To allow one set of shareholders to withhold payments on their stock assessments while the remaining stockholders paid for the benefit of the corporation their assessments, would, to say the least, present an unjust and unequitable situation. The assessment should be paid by all shareholders alike, and those who do not pay should not have a voice in electing the representatives to spend the money paid by the remaining shareholders.

In the motion to dismiss filed herein on the part of the appellees, one of its grounds was that the bill show-

ed on its face that it was without equity. The position here assumed by the appellants in this case is surely not one that could appeal to the conscience of a chancellor. After a large percentage of the stockholders had paid their assessments, appellants claiming to act as directors met and continued the delinquent sale date so as to defeat the sale of their own stock for non-payment of assessment. (Tr. page 54). When a large percentage of the stockholders had contributed their money to keep such corporation operating, it would be most inequitable to allow the control of such moneys and of such corporation by the parties who adopted such a practice as that followed here by the appellants, so as to defeat the right of the corporation to collect assessments from all stockholders equally. This was the very situation at which the by-law here enacted by the directors of the corporation was aimed, and was to prevent unequal assessments on the entire body of stockholders. It would seem unjust for a court of equity, even though such a by-law were invalid, to exercise its jurisdiction to aid in the accomplishment of the purpose contemplated by the appellants.

For the foregoing reasons, the order of the United

States District Court for the District of Nevada in the above entitled matter should be affirmed.

Respectfully submitted.

THATCHER & WOODBURN,

GEO. B. THATCHER,

WM. WOODBURN,

WM. J. FORMAN,

Attorneys for Appellees,

F. E. HORTON, FRANK HORTON, JR., R. MCCARTHY, A. F. PRICE, and WEEPAH HORTON GOLD MINES COMPANY, a corporation.